

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 ALPARI (US), LLC,

4 Plaintiff,

5 v.

17 CV 5278 (LGS)

6 BNP PARIBAS, S.A.,

7 Defendant.

8 -----x

New York, N.Y.
April 12, 2018
11:05 a.m.

10 Before:

11 HON. LORNA G. SCHOFIELD,

12 District Judge

13 APPEARANCES

14 SCOTT+SCOTT ATTORNEYS AT LAW LLP

15 Attorneys for Plaintiff

16 BY: WALTER W. NOSS (Via Telephone)

17 ALLEN & OVARY, LLP

Attorneys for Defendant

18 BY: LAURA ROSE HALL (Via Telephone)

19 CAHILL GORDON & REINDEL

Attorneys for Credit Suisse

20 BY: DAVID JANUSZEWSKI (Via Telephone)

21 DAVIS POLK

Attorneys for Royal Bank of Scotland

22 BY: JOEL M. COHEN (Via Telephone)

JENNIFER ANN PREVETE (Via Telephone)

1 (Case called)

2 THE DEPUTY CLERK: The judge is going to talk to the
3 attorneys, and we can begin.

4 THE COURT: Good morning.

5 I called this conference so that I could give you a
6 ruling on the pending motion by defendants to compel
7 arbitration. I'm not going to hear any oral argument, but if
8 any counsel would like your appearances noted on the record,
9 please tell me now who is here.

10 Why don't we just start with the plaintiffs. The
11 court reporter will take it down.

12 MR. NOSS: Good morning, your Honor. This is Walter
13 Noss from Scott & Scott on behalf of plaintiff Alpari.

14 THE COURT: Thank you.

15 How about from BNP Paribas?

16 MS. HALL: This is Laura Hall from Allen & Ovary, LLP
17 for BNP Paribas.

18 THE COURT: Credit Suisse?

19 MR. JANUSZEWSKI: Good morning, your Honor. This is
20 David Januszewski from Cahill Gordon & Reindel.

21 THE COURT: Good morning.

22 And Royal Bank of Scotland?

23 MR. COHEN: Good morning, your Honor. It's Joel Cohen
24 from Davis Polk with Jennifer Prevete, also from Davis Polk.

25 THE COURT: All right. Let's proceed. I'm not going

1 to give a lot of background. I know you're all familiar with
2 it. These are three separate putative class actions in which
3 the plaintiff Alpari brings claims that defendants reneged on
4 orders that Alpari and other putative class members matched and
5 accepted through electronic trading platforms in the foreign
6 exchange market. As I mentioned, this is a motion to compel
7 arbitration by the defendants.

8 One piece of background, the National Futures
9 Association or NFA is a self-regulatory organization with
10 authority from the Commodity Future Trading Commission to
11 regulate the derivatives market.

12 Entities that conduct business in derivatives are
13 required to register as NFA members, and Plaintiff Alpari was a
14 registered NFA member from November 14, 2007, to April 21,
15 2015.

16 Defendants BNP Paribas, Credit Suisse Securities (USA)
17 LLC, and RBS Securities Inc. are currently registered NFA
18 members. Defendants Credit Suisse AG, Credit Suisse Group AG,
19 and the Royal Bank of Scotland Group plc, which I'll call, RBS
20 Group plc are corporate parents of the NFA member defendants.

21 The NFA Member Arbitration Rules provide for mandatory
22 arbitration of "disputes between and among members" subject to
23 the timeliness requirements and enumerated exceptions, and I'm
24 quoting the NFA rule Section 2(a).

25 So turning to the legal standard, the Federal

1 Arbitration Act or FAA "embodies a national policy favoring
2 arbitration." I'm citing *Nicosia v. Amazon.com, Inc.*, 834 F.3d
3 220, 228 (2d Cir. 2016).

4 However, "a court may order arbitration of a
5 particular dispute only where the court is satisfied that the
6 parties agreed to arbitrate that dispute." *Granite Rock Co v.*
7 *Int'l Bhd. of Teamsters*, 561 U.S. 287, 297 (2010).

8 The Court considers two factors when deciding if a
9 dispute is arbitrable: "One, whether the parties agreed to
10 arbitrate, and, if so, two, whether the scope of that agreement
11 encompasses the claims at issue." *Holick v. Cellular Sales of*
12 *N.Y., LLC*, 802 F.3d 391, 394 (2d Cir. 2015).

13 "The question of whether the parties indeed agreed to
14 arbitrate is determined by state contract principles, *Nicosia*,
15 834 F.3d at 229. "The arbitration rules of an industry
16 self-regulatory organization are interpreted like contract
17 terms; the organization's arbitration provision should thus be
18 interpreted to give effect to the parties' intent as expressed
19 by the plain language of the provision." *CitiGroup Glob.*
20 *Markets Inc. v. Abbar*, 761 F.3d 268, 274 (2d Cir. 2014).

21 "While doubts concerning the scope of an arbitration
22 clause should be resolved in favor of arbitration, the
23 presumption does not apply to disputes concerning whether an
24 agreement to arbitrate has been made." *Applied Energetics,*
25 *Inc. v. NewOak Capital Markets, LLC*, 645 F.3d 522, 526, (2d

1 Cir. 2011).

2 In deciding motion to compel arbitration, courts apply
3 a "standard similar to that applied for a motion for summary
4 judgment." *Nicosia*, 834 F.3d at 229. Courts must "consider
5 all relevant, admissible evidence submitted by the parties and
6 contained in pleadings, depositions, answers to
7 interrogatories, and admissions on file, together with
8 affidavits," and must "draw all reasonable inferences in favor
9 of the nonmoving party." *Id.*

10 So turning to this case, defendants' motion to compel
11 arbitration is granted because Alpari's claims are subject to
12 mandatory NFA arbitration. As relevant here, the NFA rules
13 provide that "disputes between and among members shall be
14 arbitrated under these rules," subject to timeliness
15 requirements and exceptions not applicable here. I'm quoting
16 the NFA rule Section 2(a).

17 Alpari, as I mentioned, was a registered NFA member at
18 the time the acts or transactions that are the subject of the
19 dispute occurred and is thus a "member" for purposes of this
20 dispute as defined by the NFA rules Section 1(j).

21 Defendants BNP Paribas, S.A., Credit Suisse Securities
22 (USA) LLC, and RBS securities, Inc. are registered NFA members.
23 The remaining defendants are corporate parents of the
24 NFA-member defendants as to whom the complaints allege no
25 specific suit-related conduct distinct from that of their NFA

1 member subsidiaries. These actions are plainly "disputes
2 between and among members" and thus "shall be arbitrated" under
3 the NFA rules.

4 Alpari argues that only disputes "solely" between NFA
5 members are subject to mandatory arbitration under the rules.
6 In support, Alpari cites an NFA notice, I-99-11 from 1999,
7 explaining the contemporaneous rule changes that initiated
8 fully mandatory arbitration between NFA members. The notice
9 states that "disputes solely between members will be subject to
10 fully mandatory arbitration, which means members will be
11 required to file their claims at NFA."

12 Alpari's interpretation is unpersuasive. First, the
13 NFA notice is not part of the rules and does not bind the
14 parties. No language in the NFA rules themselves states or
15 implies that disputes must be solely between NFA members to be
16 subject to mandatory arbitration.

17 On the contrary, such a requirement would effectively
18 nullify the mandatory arbitration clause because claimants
19 would be able to side-step arbitration by naming nonmember
20 defendants in a lawsuit like the corporate parents named in
21 these cases at bar.

22 Second, to the extent the notice informs the Court's
23 interpretation of the NFA rules, in context, the notice appears
24 to draw a distinction between disputes among members and
25 disputes involving "associated persons."

1 Following the above-quoted language, the notice
2 states: "Fully mandatory arbitration will not, however, apply
3 to claims by or against associated persons where the claimant
4 will still be able to choose the forum." "Associate" is a
5 defined term in the NFA rules that pertains to "associated
6 persons as used in the Commodity Exchange Act. See NFA rules
7 Section 1(C); 7 U.S.C. 6K.

8 The CEA's implementing regulations in turn define an
9 "associated person" as "any natural person who is associated"
10 with certain entities, for instance, futures commission
11 merchants in a capacity involving soliciting or accepting
12 customers' orders or supervising such a person, 17 C.F.R.
13 Section 1.3.

14 In other words, an associated person is a salesperson
15 or supervisor of a salesperson of certain types of NFA member
16 entities. The notice makes clear that unlike disputes between
17 members, disputes by or against associated persons are not
18 fully mandatory. The NFA's member arbitration web page
19 supports this interpretation.

20 So assuming arguendo that the NFA rules do not require
21 arbitration, "under principles of estoppel, a non-signatory to
22 an arbitration agreement may compel a signatory to that
23 agreement to arbitrate a dispute where the issues the
24 non-signatory are seeking to resolve in arbitration are
25 intertwined with the agreement estopped party has signed."

1 *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 126-27,
2 (2d Cir. 2010).

3 In addition to the intertwined factual issues, there
4 must be "a relationship among the parties of a nature that
5 justifies a conclusion that the party which agreed to arbitrate
6 with another entity should be estopped from denying an
7 obligation to arbitrate a similar dispute with the adversary
8 which is not a party at that time arbitration agreement." *Id.*
9 at 127.

10 In this case, the factual issues are not merely
11 intertwined. They are identical. See *id.* at 128 and *In re A2P*
12 *SMS Antitr. Litig.*, 972 F.Supp.2d 465, 478 (S.D.N.Y. 2013).

13 The complaints do not distinguish between the NFA
14 member defendants and their nonmember corporate parents,
15 instead defining NFA members and their parent companies
16 collectively and alleging that these collective entities
17 "engaged in FX transactions with plaintiff and the class that
18 are the subject matter of this lawsuit."

19 The ultimate parent companies, Credit Suisse Group AG
20 and RBS Group plc, are bank holding companies, neither of which
21 is engaged in foreign exchange trading.

22 Under the NFA rules, Alpari is obligated to arbitrate
23 its disputes with the member defendants. It is estopped from
24 denying an obligation to arbitrate the same disputes by adding
25 nonmember holding company parents as defendants.

1 Finally, these matters are stayed to allow the
2 arbitration to proceed and conclude pursuant to the FAA, 9
3 U.S.C., Section 3, and pursuant to Second Circuit case law, see
4 *Katz v. Cellco P'ship*, 794 F.3d 341, 345, (2d Cir. 2015).

5 So, for all of these reasons, defendants' motion to
6 compel arbitration is granted, and the cases are stayed.

7 Thanks very much, counsel.

8 (Adjourned)